

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORICA L. STOCK,)	
)	No. CV-10-00130-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE,)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 13, 16.) Attorney Lora Lee Stover represents Lorica L. Stock (Plaintiff); Special Assistant United States Attorney Kathy Reif represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on October 5, 2006.¹

¹Plaintiff previously filed for disability insurance benefits on June 17, 2005 for a period of disability beginning March 7, 2005. The claim was denied initially, and upon reconsideration in December 2005. The claimant filed an untimely request for hearing on June 14, 2006, and the claimant's application was dismissed on September

(Tr. 415.) She alleged disability due to organic mental disorders and Multiple Sclerosis (MS). (Tr. 71.) Her claim was denied initially and on reconsideration. (Tr. 73-75; 78-79.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on June 17, 2008, before ALJ R.S. Chester. (Tr. 25-70.) Plaintiff, who was represented by counsel, and vocational expert Deborah LaPoint, testified. (Tr.30-69.) The ALJ denied benefits on September 11, 2008, and the Appeals Council denied review. (Tr. 13-24; 1.) The instant matter is before this court pursuant to 42 U.S.C. § 405(g).

STATEMENT OF THE CASE

The facts of the case are set forth in detail in the transcript of proceedings and are briefly summarized here. At the time of the hearing, Plaintiff was 34 years old with a high-school education and some college. (Tr. 30; 32.) Plaintiff has past work experience as a fast-food worker, phone center operator and installer of fiber optic cable. (Tr. 32-39.) Plaintiff testified that in 2005, she began having pain in her kidneys, bladder and lower back that caused her to quit her job at a fast-food restaurant. (Tr. 34-35.) The symptoms eventually dissipated. (Tr. 35.) Plaintiff reported that since 2000, she had experienced numbness on her face, hands and feet, along with vision problems. (Tr. 35.) In 2005, Plaintiff had an MRI of her brain that revealed two small white lesions, and at that time, she was diagnosed with MS. (Tr. 35.) Later, a neurologist opined that Plaintiff did not carry a diagnosis of MS. (Tr. 19.) Plaintiff reports that she currently experiences a

29, 2006. (Tr 13.)

1 variety of symptoms, including tremors, cramping in her legs, vision
2 problems, migraines, tinnitus and significant fatigue. (Tr. 40.)

3 ADMINISTRATIVE DECISION

4 At step one of the sequential evaluation process, ALJ Chester
5 found Plaintiff has not engaged in substantial gainful activity
6 since March 30, 2005, the alleged onset date. (Tr. 15.) At step
7 two, he found Plaintiff had severe impairments of organic mental
8 disorder (Cognitive Disorder NOS), anxiety related disorder (Anxiety
9 Disorder NOS), disorder of the back - discogenic and degenerative
10 (Right Central Disc Protrusion), and neurological disorder (Migraine
11 Headaches). (Tr. 15.) The ALJ determined at step three Plaintiff's
12 medically determinable impairments, alone and in combination, did
13 not meet or medically equal one of the listed impairments in 20
14 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr.
15 18.) The ALJ found Plaintiff's subjective complaints regarding
16 functional limitations were not fully credible. (Tr. 22.) At step
17 four, he determined Plaintiff had "the residual functional capacity
18 to perform the full range of light work as defined in 20 CFR
19 404.1567(b). She would be limited to one to three step well-learned
20 processes." (Tr. 21.) The ALJ found Plaintiff is capable of
21 performing past relevant work as a telephone solicitor and fast food
22 worker. (Tr. 23.)

23 STANDARD OF REVIEW

24 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
25 court set out the standard of review:

26 A district court's order upholding the Commissioner's
27 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
28 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
Commissioner may be reversed only if it is not supported
by substantial evidence or if it is based on legal error.

Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or non-disability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are

1 "under a disability" are eligible to receive benefits. 42
 2 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 3 medically determinable physical or mental impairment"
 4 which prevents one from engaging "in any substantial
 5 gainful activity" and is expected to result in death or
 6 last "for a continuous period of not less than 12 months."
 7 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 8 from "anatomical, physiological, or psychological
 9 abnormalities which are demonstrable by medically
 10 acceptable clinical and laboratory diagnostic techniques."
 11 42 U.S.C. § 423(d)(3). The Act also provides that a
 12 claimant will be eligible for benefits only if his
 13 impairments "are of such severity that he is not only
 14 unable to do his previous work but cannot, considering his
 15 age, education and work experience, engage in any other
 16 kind of substantial gainful work which exists in the
 17 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
 18 the definition of disability consists of both medical and
 19 vocational components.

20 The Commissioner has established a five-step sequential
 21 evaluation process for determining whether a person is disabled. 20
 22 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
 23 137, 140-42 (1987). In steps one through four, the burden of proof
 24 rests upon the claimant to establish a prima facie case of
 25 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
 26 920, 921 (9th Cir. 1971). This burden is met once a claimant
 27 establishes that a medically determinable physical or mental
 28 impairment prevents her from engaging in her previous occupation.
 29 20 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the
 30 presentation of 'complete and detailed objective medical reports of
 31 his condition from licensed medical professionals.'" *Meanel v.*
 32 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

33 If a claimant cannot do her past relevant work, the ALJ
 34 proceeds to step five, and the burden shifts to the Commissioner to
 35 show that (1) the claimant can make an adjustment to other work; and
 36 (2) specific jobs exist in the national economy which claimant can
 37 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*

1 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

2 **ISSUES**

3 The question is whether the ALJ's decision is supported by
4 substantial evidence and free of legal error. The Plaintiff contends
5 the ALJ's decision is not supported by substantial evidence.
6 Specifically, Plaintiff complains: (1) The ALJ failed to adequately
7 develop the record when he did not obtain testimony from appropriate
8 medical providers; (2) the ALJ's negative finding of Plaintiff's
9 credibility was erroneous; and (3) the ALJ's hypothetical failed to
10 include all Plaintiff's physical and nonexertional limitations. (ECF
11 No. 14 at 10; 14-16.) The Commissioner responds that the ALJ did
12 not have a duty to further develop the record because the record
13 clearly established that Plaintiff's impairments did not meet a
14 Listed Impairment, that the credibility determination was supported
15 by "clear and convincing" reasons and the hypothetical was complete.
16 (ECF No. 17 at 2.)

17 **DISCUSSION**

18 **A. Duty to Develop the Record.**

19 Plaintiff contends the ALJ erred because the record does not
20 support the finding that Plaintiff can perform light work.
21 Specifically, Plaintiff contends the record was inadequately
22 developed because no medical expert testified at the hearing, no
23 medical opinion evidence exists to support the conclusion that
24 Plaintiff's impairments did not constitute a Listing, and the record
25 lacks evidence about the proper exertional level in light of the
26 degenerative changes in Plaintiff's cervical spine. (ECF No. 14 at
27 12-13.) Plaintiff also asserts that the medical evidence is
28 ambiguous. (ECF No. 14 at 13.)

1 Plaintiff contends that the record is insufficient because no
2 medical provider testified at the hearing, or offered a medical
3 opinion that Plaintiff's impairments do not equal a Listing.²
4 Contrary to these assertions, the ALJ had no duty to obtain a
5 medical opinion to support the assessment that the Plaintiff's
6 impairments did not meet a Listing. It is the role of the ALJ, not
7 a medical provider, to determine if an impairment meets a Listing:

8 A treating physician's evaluation of a patient's
9 ability to work may be useful or suggestive of useful
10 information, but a treating physician ordinarily does not
11 consult a vocational expert or have the expertise of one.
12 An impairment is a purely medical condition. A disability
13 is an administrative determination of how an impairment,
14 in relation to education, age, technological, economic,
15 and social factors, affects ability to engage in gainful
16 activity. The "relationship between impairment and
17 disability remains both complex and difficult, if not
18 impossible, to predict ... The same level of injury is in
19 no way predictive of an affected individual's ability to
20 participate in major life functions (including work) ...
21 Disability may be influenced by physical, psychological,
22 and psychosocial factors that can change over time."

23 *McLeod v. Astrue*, 640 F.3d 881, 885 (9th Cir.2011), quoting American
24 Medical Association, *Guides to the Evaluation of Permanent*
25 *Impairment*, 5-6 (6th ed. 2008).

26 Moreover, an ALJ properly rejects a physician's opinion on
27 whether a claimant can work at any job, because this "determination
28 is for the Social Security Administration to make, not a physician."
29 *McLeod* 640 F.3d at 885. "'Although a treating physician's opinion

30 ²Plaintiff also argues that "there was no review of the
31 Plaintiff's claim file by a physician from DDS at any time..." (ECF
32 No. 14 at 12.) As the Commissioner points out, the record
33 contradicts this assertion. Alfred Scottolini, M.D., reviewed the
34 medical record for DDS and affirmed the RFC. (Tr. 427.)

1 is generally afforded the greatest weight in disability cases, it is
2 not binding on an ALJ with respect to the existence of an impairment
3 or the ultimate determination of disability.'" *Id.*, quoting *Mayes*,
4 *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001). The law
5 reserves the disability determination to the Commissioner. 20
6 C.F.R. § 404.1527(e)(1). The ALJ's failure to obtain a medical
7 opinion about the accuracy of his disability determination was not
8 error.

9 Plaintiff also alleges that the ALJ erred by failing to
10 adequately develop the record. In Social Security cases, the ALJ
11 has a special duty to develop the record fully and fairly and to
12 ensure that the claimant's interests are considered, even when the
13 claimant is represented by counsel. *Tonapetyan v. Halter*, 242 F.3d
14 1144, 1150 (9th Cir. 2001). An "ALJ's duty to develop the record
15 further is triggered only when there is ambiguous evidence or when
16 the record is inadequate to allow for proper evaluation of the
17 evidence." *Mayes*, 276 F.3d at 459-60 (9th Cir. 2001).

18 In this case, the ALJ's duty was not triggered because the
19 record is unambiguous and contains sufficient evidence to support
20 the ALJ's conclusions that neither Plaintiff's physical nor mental
21 impairments, or the combination of both, met the Listings. (Tr. 18-
22 19.)

23 For example,³ the ALJ carefully reviewed the medical reports
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25 ³Plaintiff failed to specify which impairment, or if it is the
26 combination of impairments that she believed meets or equals a
27 Listing. As Defendant points out, Plaintiff failed to "present a
28 plausible theory for how her impairments meet a Listing." (ECF No.

1 related to Plaintiff's spine. Listing 1.04 addresses disorders of
2 the spine. See 20 C.F.R., Pt. 404, Appx. A., Subpart P, Sec. 1.04
3 (parenthesis omitted). To meet the Listing, a claimant must
4 establish:

5 A. Evidence of nerve root compression characterized by
6 neuro-anatomic distribution of pain, limitation of motion
7 of the spine, motor loss (atrophy with associated muscle
8 weakness or muscle weakness) accompanied by sensory or
9 reflex loss and, if there is involvement of the lower
10 back, positive straight-leg raising test (sitting and
11 supine); or

12 B. Spinal arachnoiditis, confirmed by an operative note
13 or pathology report of tissue biopsy, or by appropriate
14 medically acceptable imaging, manifested by severe burning
or painful dysesthesia, resulting in the need for changes
in position or posture more than once every 2 hours; or

15 C. Lumbar spinal stenosis resulting in pseudoclaudication,
16 established by findings on appropriate medically
17 acceptable imaging, manifested by chronic nonradicular
18 pain and weakness, and resulting in inability to ambulate
19 effectively, as defined in 1.00B2b.

20 See 20 C.F.R., Pt. 404, Appx. A., Subpart P, Sec. 1.04B.

21 The record reveals that none of these conditions are met in
22 this case. The ALJ noted that while an MRI from 2006 showed a broad-
23 based central and right paracentral disc protrusion, Stephen Pugh,
24 M.D., concluded that Plaintiff did not require surgery. The most
25 recent MRI from June 2008 indicated a persistent disc-spur complex
26 at C5-6, but noted the condition had not significantly changed from
27 2006. (Tr. 18, 287.) Contrary to Plaintiff's claims she suffers
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17 at 5.) At step three, An ALJ is not required to discuss
equivalency unless the claimant has proffered a plausible theory as
to how the combined impairments satisfy the criteria for a Listing.
Lewis v. Apfel, 236 F.3d 503, 514 (9th Cir. 2001).

1 "degenerative changes of the cervical spine from an objective
2 standpoint," the ALJ noted that the medical evidence indicates
3 Plaintiff has experienced no significant deterioration or change in
4 this condition. (ECF No. 14 at 13; Tr. 18.)

5 Three additional studies - a 2007 electrodiagnostic study by
6 Scott E. Carlson, M.D., a 2007 cervical spine MRI by William Dubiel,
7 M.D., and a 2008 electromyography nerve conduction study by Dr.
8 Carlson - all indicated no significant abnormalities related to the
9 Plaintiff's spine. (Tr. 18, 395-396, 439.) The record was
10 adequately developed and supports the ALJ's conclusion that the
11 Plaintiff's spine condition did not equal a Listed Impairment.

12 Similarly, with regard to Plaintiff's Multiple Sclerosis
13 diagnosis, insufficient evidence existed that Plaintiff actually
14 suffers from MS. To meet a Listing, the Plaintiff must show, among
15 other things, a diagnosis of MS. 20 CFR Pt. 404, Subpt. P, App. 1
16 § 11. The ALJ noted that after a 2005 brain scan revealed two
17 lesions, David R. Greely, M.D., described Plaintiff as having "a
18 possibility of MS since March 2005." (Tr. 282.) The ALJ reviewed
19 records from Steven Pugh, M.D., who examined Plaintiff and opined
20 that her symptoms were worsening not due to MS, but due to anxiety.
21 (Tr. 19.) The records include a brain MRI in 2006 that revealed
22 "very little MS-type activity," a normal spine, and lesions that had
23 diminished in size. (Tr. 19.) A 2007 MRI showed no evidence of
24 change, despite Plaintiff's ceasing her medications one month prior
25 to the MRI. (Tr. 19.)

26 The records also revealed notes from 2008 in which Michael
27 Olek, M.D., reviewed the 2007 MRI and declined to diagnosis
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1 Plaintiff with MS. Plaintiff's subsequent spinal tap revealed
2 unremarkable results. (Tr. 19.) Based on this medical evidence,
3 the ALJ concluded that "Plaintiff does not carry a diagnosis of MS
4 and that it does not represent a severe impairment." (Tr. 19.)

5 Notwithstanding Plaintiff's claims to the contrary, the medical
6 evidence is unambiguous and adequate to allow for proper evaluation
7 of the claim. While Plaintiff characterizes the various physician's
8 diagnoses as contradictory, a close examination of the record
9 reveals that in the course of treating Plaintiff, the diagnosis
10 changed based upon the lack of MS-type symptoms and signs.

11 One year after the preliminary diagnosis of MS, Dr. Greeley
12 characterized Plaintiff as a having a "possibility of MS" and that
13 Plaintiff had "concerns that she has a great deal of worsening
14 symptoms. I think that they are more likely related to anxiety.
15 She thinks that they are related to MS." (Tr. 281.) Dr. Greeley
16 referred Plaintiff to Dr. Pugh in light of his expertise in the
17 field. (Tr. 281.) In 2006, Dr. Pugh saw Plaintiff and noted that
18 the 2006 MRI revealed the brain lesions had diminished in size.
19 (Tr. 292.) Several months later, Dr. Pugh again saw Plaintiff who
20 reported no "relapse-type symptoms" but had a "whole list of other
21 symptoms, including back pain, fatigue, intermittent hearing changes
22 and headaches." (Tr. 309.) Dr. Pugh concluded Plaintiff's MS was
23 "fairly mild" and the scan revealed "not...much evidence of MS at
24 all...." (Tr. 309.) Dr. Pugh concluded that Plaintiff's "whole
25 host of various symptoms ... are most likely secondary to anxiety
26 or a somatic disorder." (Tr. 309.)

27 The medical records reveal that while Plaintiff had two lesions
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1 in her brain, the physicians concluded that after treating
2 Plaintiff's varied and seemingly unrelated symptoms over time, a
3 diagnosis of MS was inappropriate. The ALJ's conclusion that
4 Plaintiff's condition does not meet a Listing is supported by an
5 unambiguous, sufficient record.

6 **B. Plaintiff's Credibility.**

7 Plaintiff argues that the ALJ failed to articulate "convincing
8 rationale" for disregarding Plaintiff's testimony about the severity
9 of her symptoms. (ECF. No. 14 at 14-15) When the ALJ finds a
10 claimant's statements as to the severity of impairments, pain, and
11 limitations are not credible, the ALJ must make a credibility
12 determination with findings sufficiently specific to permit the
13 court to conclude the ALJ did not arbitrarily discredit claimant's
14 allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
15 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991) (en
16 banc). If no affirmative evidence exists that the claimant is
17 malingering, the ALJ must provide "clear and convincing" reasons for
18 rejecting the claimant's allegations regarding the severity of
19 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). The
20 ALJ engages in a two-step analysis in deciding whether to admit a
21 claimant's subjective symptom testimony. *Smolen v. Chater*, 80 F.3d
22 1273, 1281 (9th Cir. 1996).

23 Under the first step, the ALJ must find the claimant has
24 produced objective medical evidence of an underlying "impairment,"
25 and that the impairment, or combination of impairments, "could
26 reasonably be expected to produce pain or other symptoms." *Cotton*
27 *v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986). Once the *Cotton* test
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1 is met, the ALJ must evaluate the credibility of the claimant. In
2 evaluating credibility, the ALJ may consider an unexplained failure
3 to follow treatment recommendations and testimony by the claimant
4 "that appears less than candid." *Tommasetti v. Astrue*, 533 F.3d
5 1035, 1039 (9th Cir. 2008). Also, the ALJ may consider the lack of
6 consistent treatment, or an "unexplained or inadequately explained,
7 failure to seek treatment or follow a prescribed course of
8 treatment" can cast doubt on a claimant's sincerity. *Fair v. Bowen*,
9 885 F.2d 597, 603 (9th Cir.1989); *Burch v. Barnhart*, 400 F.3d 676,
10 681 (9th Cir.2005).

11 In this case, Plaintiff alleged that the severity of her
12 symptoms prevented her from working. In discrediting that testimony,
13 the ALJ thoroughly reviewed multiple medical opinions that indicated
14 Plaintiff's symptoms were not due to MS, but rather were due to
15 anxiety.⁴ Yet despite repeated instructions and encouragement to
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17 ⁴For example, the ALJ cited Dr. Pugh's December 2006 notes that
18 indicate his opinion that Plaintiff's "whole host of various
19 symptoms" was likely secondary to anxiety or somatic disorder. (Tr.
20 22.) The ALJ also referred to Dr. Greeley's opinion that Plaintiff's
21 worsening symptoms were due to anxiety, not MS. (Tr. 22.)
22 Additionally, the ALJ noted that Teri Tupper, ARNP, reviewed two MRI
23 results from Plaintiff's brain and concluded that none of the
24 symptoms she was experiencing could be blamed on the lesions
25 revealed in the MRI. (Tr. 22.) Ms. Tupper repeatedly advised
26 Plaintiff to seek mental health counseling, yet she did not. (Tr.
27 22.) Also, the ALJ noted 2008 exam notes by Christie L. Gibson that
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1 seek mental health assistance, Plaintiff resisted seeking treatment.
2 (Tr. 295; 388; 392; 447-48; 502.)

3 In light of Plaintiff's failure to seek mental health
4 counseling for her anxiety and panic attacks despite repeated
5 instructions to do so, the ALJ's credibility determination is a
6 reasonable interpretation of the evidence, is supported by specific,
7 "clear and convincing" reasons, and, therefore, may not be
8 disturbed.

9 **C. The Hypothetical**

10 Plaintiff argues that the hypothetical failed to include all
11 Plaintiff's physical and mental limitations. (ECF No. 14 at 10; 14-
12 16.) Plaintiff specifically points to the fact that the
13 hypothetical did not contain "limitations posed by her cervical
14 condition regarding finger, handling and push/pull movements as a
15 result of her upper extremity impairments." (ECF No. 14 at 14.) In
16 addition, Plaintiff alleges the hypothetical lacked limitations
17 related to "how her mental illness would affect her ability to
18 attend and concentrate, nor how stress in the workplace would affect
19 this condition." (ECF No. 14 at 14.)

20 An ALJ's findings will be upheld if the weight of the medical
21 evidence supports the hypothetical posed by the ALJ. See *Martinez*
22 *v. Heckler*, 807 F.2d 771, 774 (9th Cir. 1987); *Gallant v. Heckler*,
23 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's
24 testimony therefore must be reliable in light of the medical

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26 _____
27 indicate her opinion the majority of Plaintiff's symptoms are due to
28 panic attacks. (Tr. 22)

1 evidence to qualify as substantial evidence. See *Embrey v. Bowen*,
2 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's
3 description of the claimant's disability "must be accurate,
4 detailed, and supported by the medical record." *Id.* (citations
5 omitted). The ALJ, however, may omit from that description those
6 limitations he or she finds do not exist. See *Rollins v. Massanari*,
7 261 F.3d 853, 857 (9th Cir. 2001).

8 At the hearing, the ALJ posed a hypothetical question to the
9 vocational expert containing substantially the same limitations as
10 Plaintiff's residual functional capacity of "light work."⁵ (Tr. 21;
11 see CFR §404.1567(b).) In response to the hypothetical question,
12 the vocational expert testified that an individual with those
13 limitations, and who had the same age, education and work experience
14 as Plaintiff, would be able to perform the past relevant jobs of
15 telephone agent and fast food worker. (Tr. 24.) Based on the
16 testimony of the vocational expert, the ALJ found Plaintiff to be
17 capable of performing these past jobs, and that these jobs exist in
18 significant numbers in the national economy. (Tr. 24.)

19 In social security proceedings, the claimant must prove the
20 existence of a physical or mental impairment by providing medical

21 _____
22 ⁵Tr. 64:

23 Ms. Lapoint, if we assume that the claimant could, with
24 her particular age, experience, and education, is able
25 [sic] to lift 20 pounds occasionally, 10 pounds
26 frequently, can ... stand and walk... six hours in an
27 eight hour day and has unlimited use of her extremities,
28 could the claimant perform her past work? ... If we added
additional restriction that she's limited to one and two
step simpler processes or three step repetitive type
tasks, would she still be able to perform her past work?

1 evidence consisting of signs, symptoms, and laboratory findings; the
2 claimant's own statement of symptoms alone will not suffice. 20
3 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
4 the basis of a medically determinable impairment which can be shown
5 to be the cause of the symptoms. 20 C.F.R. § 4416.929.

6 In Social Security Ruling (SSR) 96-4p, the SSA explained what
7 is needed under SSA regulations to show a medically determinable
8 impairment. SSR 96-4p, 1996 WL 374187 (July 2, 1996).⁶ The ruling
9 clarified "[a]lthough the regulations provide that the existence of
10 a medically determinable physical or mental impairment must be
11 established by medical evidence consisting of signs, symptoms, and
12 laboratory findings, the regulations further provide that under no
13 circumstances may the existence of an impairment be established on
14 the basis of symptoms alone." *Id.* at 1 (footnote omitted); see also
15 20 C.F.R. §§ 404.1508, 416.908.

16 The distinction between symptoms and signs is: "symptoms ...
17 are an individual's own perception or description of the impact of
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19 ⁶"SSRs do not have the force of law" but "represent the
20 Commissioner's interpretation of the agency's regulations." *Holohan*
21 *v. Massanari*, 246 F.3d 1195, 1202 n.1 (9th Cir. 2001). Courts
22 therefore "give them some deference" as long as they are consistent
23 with the Social Security Act and regulations. *Id.* (citation
24 omitted). SSR 96-4p is consistent with the purpose of Title II and
25 XVI of the Social Security Act to provide financial assistance to
26 those who are disabled. See *Kildare v. Saenz*, 325 F.3d 1078, 1080
27 (9th Cir. 2003).
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1 his or her physical or mental impairment(s) [W]hen any of these
2 manifestations is an anatomical, physiological, or psychological
3 abnormality that can be shown by medically acceptable clinical
4 diagnostic techniques, it represents a medical 'sign' rather than a
5 'symptom.' " SSR 96-4p, 1996 WL 374187, at 1 n.2; see also 20 C.F.R.
6 §§ 404.1528(a)- (b), 416.928(a)- (b). Objective medical evidence is
7 critical to a determination of disability:

8 [R]egardless of how many symptoms an individual alleges,
9 or how genuine the individual's complaints may appear to
10 be, the existence of a medically determinable physical or
11 mental impairment cannot be established in the absence of
12 objective medical abnormalities; i.e., medical signs and
13 laboratory findings.

14 ... In claims in which there are no medical signs or
15 laboratory findings to substantiate the existence of a
16 medically determinable physical or mental impairment, the
17 individual must be found not disabled at step 2 of the
18 sequential evaluation process.

19 SSR 96-4p, 1996 WL 374187, at 1-2.

20 Thus, Plaintiff can establish an impairment only if the record
21 includes signs - the results of "medically acceptable clinical
22 diagnostic techniques," such as tests - as well as symptoms, or
23 Plaintiff's representations regarding her impairment. *Ukolov v.*
24 *Barnhart*, 420 F.3d 1002, 1005 (9th 2005). Additionally, a medical
25 opinion offered in support of an impairment must include symptoms
26 and a diagnosis. *Id.*, citing SSR 96-6p, 1996 WL 374180, at 1 (July
27 2, 1996).

28 In this case, Plaintiff complains on appeal that the
hypothetical failed to incorporate her self-reported symptoms, such
as hand weakness, cramping in her legs, and fatigue. But Plaintiff
failed to provide a medical diagnosis related to these symptoms. In

1 the absence of a medical diagnosis that would support these symptoms
2 as signs, the ALJ's hypothetical properly omitted these purported
3 limitations.

4 Moreover, the hypothetical was proper because it included the
5 limitations as assessed by both Joyce Everhart, Ph.D., and Mary A.
6 Gentile, Ph.D. Dr. Everhart opined in 2006 that Plaintiff had the
7 ability to listen, understand, and remember a three-step direction.
8 (Tr. 306.) She also determined Plaintiff has the ability to
9 complete one or two-step tasks of a repetitive nature, and is likely
10 to have difficulty with complex multi-step tasks. (Tr. 306.)

11 Dr. Gentile opined that Plaintiff was moderately limited in her
12 abilities to: (a) understand and remember detailed instructions;
13 (b) carry out detailed instructions; (c) maintain attention and
14 concentration for extended periods; and (d) complete a normal
15 workday and workweek without interruptions from psychologically
16 based symptoms and to perform at a consistent pace without an
17 unreasonable number and length of rest periods. (Tr. 411-12.)
18 Also, in June, 2007, Alfred Scottini, M.D., reviewed the medical
19 records and approved the RFC. (Tr. 427.) The hypothetical
20 incorporated these restrictions by including in the description a
21 job that has one and two step simpler processes or three step
22 repetitive tasks. (See Tr. 64.)

23 As noted above, the ALJ properly rejected Plaintiff's
24 subjective complaints of impairment because the ALJ found they were
25 lacking credibility. Accordingly, the ALJ was not obligated to
26 include those limitations in his hypothetical to the VE. See, e.g.,
27 *Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989); *Copeland*

1 v. *Bowen*, 861 F.2d 536, 540 (9th Cir. 1988). In light of Plaintiff's
2 diminished credibility finding and failure to establish a diagnosis
3 supported by medical evidence, the ALJ's hypothetical to the VE was
4 complete.

5 **CONCLUSION**

6 The ALJ's findings reflect a rational interpretation of the
7 record, and his determination of non-disability is based on
8 substantial evidence and free of legal error. Accordingly,

9 **IT IS ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
11 **DENIED;**

12 2. Defendant's Motion for Summary Judgment (**ECF No. 16**) is
13 **GRANTED.**

14 The District Court Executive is directed to file this Order and
15 provide a copy to counsel for Plaintiff and Defendant. Judgment
16 shall be entered for Defendant, and the file shall be **CLOSED.**

17 DATED July 14, 2011.

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19 S/ CYNTHIA IMBROGNO
20 UNITED STATES MAGISTRATE JUDGE
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